

86119

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-186848

DATE: October 6, 1976

MATTER OF: Record Electric Inc.

DIGEST:

Telegraphic bid modification, unable to be transcribed intelligibly from Western Union office to telex receiver at procuring activity followed by inability to transmit when activity had "run out" of forms for receiving telegrams, all prior to bid opening, was properly not considered since Western Union was substantial cause for nonreceipt by failing (1) to resupply agency with forms timely ordered and (2) to deliver telegram by other means upon being apprised on evening before bid opening that receiver could not accept further telegrams. Prior decisions involving mishandling in process or as opposed to after receipt at Government installation are distinguished.

Record Electric Inc. protests the rejection of a modification to its bid as late and the award of a contract to Allen Electric Co., Inc., to effect electrical repairs in various buildings at the United States Marine Corps Air Station, El Toro, Santa Ana, California, under invitation for bids (IFB) No. N62474-76-B-0582, issued on May 14, 1976, by the Naval Facilities Engineering Command (NAVFAC).

The IFB was amended twice. The materiality of the amendments, one of which extended the bid opening date from June 17 to June 23 at 11 a.m., has not been questioned by the protester. Record Electric submitted a timely bid which did not acknowledge receipt of the amendments. From the evening of June 22 to the time for bid opening on June 23, several unsuccessful attempts were made by Western Union to transmit to the procuring activity a modification to the Record Electric bid. That modification (1) reduced the protester's bid prices below those of the eventual contractor; and (2) acknowledged receipt of the amendments. The Communications Watch Officer on duty at the procuring activity on the evening of June 22 discusses the pertinent circumstances, as follows:

"1. On the evening of 22 June 1976, at approximately 1900, Western Union attempted to send us a telegram. At this time the Communication Center had only three forms for receiving these telegrams left. A request for these forms had been submitted a few days earlier to Western Union, however, we had not, as of that time, received the forms.

"2. The first two times the message was sent to the Communication Center, that night, they were unreadable. I immediately called Western Union about this problem and the problem of having just one form left. The gentleman I was talking to at that time informed me he had a message he had to send us. He then checked his records and confirmed the fact that we did order more forms but seemed surprised we had not received them. I then asked him if he could bring the message over by courier and he said 'no', that he would straighten everything out in the morning and get the message over to us then."

Counsel for NAVFAC advises that, on June 23, prior to the 11 a.m. opening of bids (1) Western Union advised the procuring activity by telephone of a telegraphic modification of bid by Record Electric; (2) Western Union was advised that the modification could not be accepted by telephone and must be delivered prior to bid opening; and (3) no such message was received prior to bid opening.

According to counsel, prior to the close of business on June 30, 1976, Record Electric was advised by telephone that the telegraphic modification still had not been received and that award was being made to the lowest bidder. Award was made to Allen Electric on that date. The record is not clear as to when or if the telegraphic modification was ever received in intelligible form at the procuring activity directly from Western Union. However, the copy of the telegraphic modification submitted by Record Electric with the protest appears to be genuine and represents the telegraphic modification which Western Union attempted to transmit. This is supported, in part, by the fact that the proffered copy of the telegraphic modification contains the procuring activity's acknowledgment of receipt.

B-186848

Clause 7 of the Instructions to Bidders of the IFB as prescribed by Armed Services Procurement Regulation (ASPR) § 7-2002.2 (1975 ed.) states, in pertinent part:

"(a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before the award is made and either:

* * * * *

"(i) it was sent by mail (or telegram if authorized) and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation.

"(b) Any modification or withdrawal of bid is subject to the same conditions as : (a) above * * *

"(c) The only acceptable evidence to establish: * * *

* * * * *

"(ii) the time of receipt at the Government installation is the time/date stamp of such installation on the bid wrapper or other documentary evidence of receipt maintained by the installation."

The protest here is similar to those involved in two recent decisions of our Office dealing with a timely telegraphic bid and modification not received at Government installations allegedly due to mishandling in the process of as opposed to after receipt at the Government installation. Hydro Fitting Mfg. Corp., 54 Comp. Gen. 999 (1975), 75-1 CPD 331, and I&E Construction Company Incorporated, B-186766, August 9, 1976, 55 Comp. Gen. _____, 76-2 CPD 139. In the former decision, which involved the nonreceipt of a telegraphic bid due to a malfunction in a Government telex receiver, we discussed this general situation as follows:

"In the past, our Office has construed ASPR § 7-2002.2 (formerly ASPR § 2-303.2) as authorizing the consideration of a late bid which

B-186848

arrived at a Government installation in sufficient time prior to bid opening to have been timely delivered to the place designated in the invitation. However, in the cases considered, bids did not reach the designated bid opening office until after bid opening due to mishandling on the part of the installation. See 46 Comp. Gen. 771 (1967); 43 *id.* 317 (1963); B-165474, January 8, 1969; B-163760, May 16, 1968; and B-112264, April 10, 1962. In these cases, the time/date stamp on each bid wrapper was used to establish timely receipt at the Government installation. In the instant situation, there is neither the bid nor a time/date stamp or other documentary evidence of receipt maintained at the installation to establish receipt. Therefore, argues DSA, the test of ASPR § 7-2002.2(c)(ii) has not been met and Hydro's 'late' bid cannot be considered.

"We agree with DSA in that a reading of the regulation as implemented in the invitation would correctly appear to authorize not considering the confirming telegraphic bid of Hydro submitted after bid opening. Not only is the requisite acceptable evidence of time of receipt nonexistent but, despite DSA's statement that the original telegraphic bid was received and acknowledged, we believe that whether there was 'receipt' in the context of the regulation is questionable. In this regard, consideration of a late telegraphic bid is permitted only if late receipt was due to mishandling by the Government after receipt at the Government installation. That mishandling by the Government occurred here is, we believe, clear. But, in our view, the regulation contemplates, and our decisions thereon have involved, instances where a tangible bid was mishandled after physical receipt.

"While this may be the case, we believe that strict and literal application of the regulation should not be utilized to reject a bid where to do so would contravene the intent and spirit of the late bid regulation. The regulation insures that late bids will not be considered if there exists any possibility that the late bidder would gain an unfair advantage over other

bidders. In addition, '* * * The purpose of the rules governing consideration of late bids is to insure for the Government the benefits of the maximum of legitimate competition, not to give one bidder a wholly unmerited advantage over another by over-technical application of the rules.' 42 Comp. Gen. 508; 514 (1963); and B-157176, August 30, 1966. This belief is particularly proper here because, in our view, the current regulation did not contemplate the instant circumstances, i.e. mishandling in the transcription of a telegraphic bid and the resultant failure of a Government installation to have actual control over the bid or evidence of time of receipt."

We believe that, in unusual circumstances like this, mishandling by the Government must be paramount in the failure of a bid or modification to be received. To this same effect, the standard late bid clause in the IFB provides that late receipt must be due "solely" to Government mishandling. In the above-cited cases, the Government was completely at fault from which we concluded that the bidding documents should be considered. In Hydro, there was a failure to monitor a Government telex machine with the result that an absence of paper to accept messages and a jamming of tape went undetected. In I&E a Government building was closed. Furthermore, in both cases, Western Union did not contribute to the nonreceipt, either because Western Union had no knowledge of the nonreceipt (Hydro) or could have taken no steps to counter the Government's prevention of receipt (I&E).

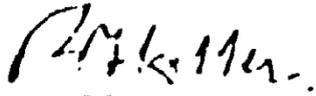
We have no specific information on responsibility for maintaining the receiver in question other than counsel for NAVFAC's referring to "the Western Union receiver"; therefore, we cannot ascertain who was at fault, if anyone, for the malfunctioning of the machine. However, we believe the record adequately demonstrates distinguishing features from the above cases and supports the Navy's conclusion that the modification should not have been considered. While it might be argued that the "running out" of forms alone exhibited some degree of negligence on the part of the Government in contributing to the nonreceipt of the modification, we do not find that such negligence would have even approximated the requisite level as demonstrated by Hydro and I&E. Rather, we find the substantial cause for the nonreceipt to have been Western Union.

B-186848

The above-quoted statement from the Communications Watch Officer shows that the Navy apparently ordered, but Western Union did not deliver, a new supply of forms for receiving telegrams sufficiently in advance for timely delivery prior to "running out." Also, Western Union was immediately apprised of the inability of the receiver to accept telegrams on the evening before bid opening. Notwithstanding this, Western Union failed to deliver the telegram clearly marked for delivery prior to bid opening by other means such as a messenger. In our opinion, the Navy had no obligation to send a messenger to Western Union or accept the modification by telephone. Parenthetically, we note that permissible telephonic receipt of telegraphic modifications was specifically deleted from the ASPP in Defense Procurement Circular No. 110, May 30, 1973. Contrast Federal Procurement regulations § 1-2.304(a) (1964 ed. amend. 118).

In view of the above, the protest is denied.

Deputy


Comptroller General
of the United States